In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1192

WILLIAM BOSTIC, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner raises the question whether liability for violating a Federal Trade Commission order which prohibits the use of "bait and switch" tactics in the sale of certain aluminum products "or any other products" may be based on the use of those tactics in the sale of swimming pools.

1. By complaint issued in 1964 (67 F.T.C. 1), the Federal Trade Commission initiated an administrative proceeding alleging that petitioner and certain firms he controlled had used "bait and switch" tactics in the sale of aluminum products, in violation of Section 5 of the Federal Trade Commission Act (15 U.S.C. 45).[1]

[1] Section 5(a)(1) of the Act provides: "Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are declared unlawful."

The agency proceedings were terminated by the entry of a consent cease-and-desist order (Pet. App. 1c-2c) which prohibits petitioner

> * * * in connection with the offering for sale, sale or distribution of aluminum carports, aluminum patio covers, aluminum siding, *or any other products in commerce* * * * from:
>
> 1. Using, in any manner, any advertising, sales plan, scheme or device wherein false, misleading or deceptive statements or representations are made in order to obtain leads or prospects for the sale of products or services.
>
> 2. Discouraging the purchase of, or disparaging, any products or services which are advertised or offered for sale.
>
> 3. Representing, directly or by implication, that any products or services are offered for sale when such offer is not a bona fide offer to sell such products or services * * *.[Emphasis added.]

Subsequent investigations led the Commission to believe that petitioner was using the prohibited "bait and switch" tactics in the sale of swimming pools in violation of the order. Accordingly, pursuant to 15 U.S.C. 56, it certified the facts constituting the violations to the Attorney General, who in turn instituted

this suit under Section 5(*l*) of the Act[2] for civil penalties and injunctive relief.[3]

After a non-jury trial, the district court concluded that petitioner had violated the "clear and unambiguous" terms of the order on twenty separate occasions in connection with the sale of swimming pools. 336 F. Supp. 1312, 1320-1321; Pet. App. 1b, 18b-19b. It ruled that petitioner "has flagrantly and repeatedly violated" the order and that the "blatant nature of [petitioner's] disregard" for the order "warrants the imposition of a sizable penalty" of $4,000 for each violation—a total penalty of $80,000, and the issuance of an injunction against further violations. 336 F. Supp. at 1321; Pet. App. 19b-20b.

The court of appeals affirmed the judgment of the district court *per curiam* "for the reasons sufficiently stated by the district court" (Pet. App. 1a-2a).

2. The decision below is correct and the petition raises no question warranting further review.

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[2] Section 5(*l*) (15 U.S.C. 45(*l*)) provides, in pertinent part:

> Any person, partnership, or corporation who violates an order of the Commission to cease and desist after it has become final, and while such order is in effect, shall forfeit and pay to the United States a civil penalty of not more than $5,000 for each violation, which shall accrue to the United States and may be recovered in a civil action brought by the United States. * * *

[3] Violations of a Commission cease-and-desist order subject the violator to penalties in proceedings under Section 5(*l*). Contrary to petitioner's contention (Pet. 10-11), there is no requirement that "adjudication hearings" before the Commission must precede the institution of a civil penalty suit for violating a Commission order.

Petitioner asserts (Pet. 9) that the consent cease-and-desist order "in the broad words of the statute, * * * perpetually enjoin[s] the petitioner to obey a vague statutory provision on pain of contempt or penalty proceedings, without providing any guideposts for compliance beyond the perplexing test of the statute itself."[4] The order, however, prohibits the use of misleading statements in sales and advertising and petitioner does not deny that he engaged in misleading "bait and switch" tactics after the order became final.

To the extent that petitioner claims that the order is too broad or too vague because it prohibits "bait and switch" tactics in the sale of "any other products," that claim is equally untenable. Petitioner agreed to the entry of the order; it is no defense to a proceeding to enforce the order that petitioner agreed to too much. Had petitioner insisted upon limiting the consent order to those products he was then selling, the Commission might well have proceeded with the litigation. Had it then found that petitioner had employed "bait and switch" tactics, it could properly have prohibited him from employing such tactics in the future with respect to any product.[5] *Federal Trade Commission* v. *Colgate Palmolive Co.*, 380 U.S. 374, 394-395; *Niresk Industries, Inc.* v. *Federal Trade Commission*, 278 F. 2d 333, 342-

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[4] There is no provision for contempt proceedings for violating a Federal Trade Commission order which has not been enforced by a court of appeals.

[5] The agreement entered into by the parties to the Commission proceedings which formed the basis for the entry of the consent order in this case contained a stipulation of facts which the hearing examiner found "amply and unequivocally support the allegations and charge of the [Commission's] complaint * * *" (67 F.T.C. 4, 8).

343 (C.A. 7), certiorari denied, 364 U.S. 883. If such a prohibition is appropriate in a litigated Commission order, it is no less appropriate in a consent order. Having agreed to it, petitioner was bound to comply with it. He cannot collaterally challenge it now.

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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APRIL 1973.